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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1951

No. 7[redacted] 61

NAT YANISH and JOHN DIAZ,
*Petitioners,*

vs.

BRUCE G. BARBER, individually, and as District Director, 13th Immigration District, Immigration and Naturalization Service, Department of Justice,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## PETITION FOR WRIT OF CERTIORARI.

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Nat Yanish and John Diaz, petitioners, pray that a writ of certiorari issue to review the judgment of

the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 28, 1952.

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## OPINIONS BELOW.

The initial District Court decision in the cause is reported at 81 Fed. Supp. 499 under the name "Yanish, et al. v. Wixon". The first decision of the Court of Appeals for the Ninth Circuit is reported at 181 Fed. (2d) 492 under the name "Yanish, et al. v. Barber". The second opinion of the District Court, dated July 27, 1950, is unreported. The second opinion of the Court of Appeals for the Ninth Circuit, dated February 25, 1952, is unreported.

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## JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 25, 1948. A petition for rehearing was denied April 4, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. §1251(1).

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## QUESTION PRESENTED.

Whether the Act of Congress, Public Law 843, 81st Congress, 64 Stat. 1048, 8 U.S.C.A. §155a, known as the Supplemental Appropriations Act, providing that "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard

to the provisions of §§5, 7 and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007)," is constitutional as interpreted and applied by the Immigration and Naturalization Service and the Court of Appeals for the Ninth Circuit.

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## STATUTE INVOLVED.

The pertinent statutory provisions and regulations are printed in Appendices, A, B and C.

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## STATEMENT.

Petitioners are aliens, who in October 1948 were being prosecuted in deportation proceedings before a hearing officer of the Immigration and Naturalization Service in the 13th Immigration District. The hearing officer had been appointed, and the hearings were being conducted, without regard to the provisions of the Administrative Procedure Act (5 U.S.C.A. 1001, et seq., hereinafter referred to as the APA). (R. 5-6.) Petitioner Yanish objected to this procedure early in the course of the administrative hearing. (R. 11.) Petitioners filed a complaint for injunction and for review of agency action under the APA. They sought to restrain the respondent from proceeding without compliance with the said APA. (R. 3-18.)

Respondent's predecessor (hereafter no distinction will be made between the acts of respondent and the

acts of his predecessor) filed a motion in opposition to plaintiffs' request for restraining order, on the grounds, among others, that the APA had no application to hearings in deportation proceedings. (R. 19-20.) The District Court on December 20, 1948, filed a decision denying the injunction and dismissing the complaint, on the ground that the procedures of the Immigration Service fall within the exceptions specified in §7(a) of the APA (5 U.S.C.A. §1006[a]). (R. 21-23.) That section provided:

> "Nothing in this chapter shall be deemed to supercede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers especially provided for by or designated pursuant to statute."

Petitioners appealed to the Court of Appeals for the Ninth Circuit.

While the appeal was pending, and after it had been argued, the Supreme Court of the United States decided the case of *Wong Yang Sung v. McGrath,* 339 U.S. 33, holding the APA applicable to deportation proceedings. The Court of Appeals for the Ninth Circuit, in a *per curiam* opinion (R. 26-27) reversed the District Court. It held in effect that any deportation proceedings conducted in accordance with then existing regulations must conform to the APA, regardless of the date such proceedings were initiated, noting that since the decision in *Wong Yang Sung v. McGrath,* supra, the regulations of the Department had been amended to conform to that decision, and that such regulations:

"* * * are applicable to proceedings inaugurated prior as well as subsequent to the effective date of the Administrative Procedure Act, no exceptions appearing therein." (R. 26-27.)

The mandate of the Court of Appeals reversed the order of the District Court and remanded the cause to that Court with instructions:

"* * * to grant the relief prayed for in the complaint, or if that course is found to be unnecessary to make such other disposition of the cause as may be appropriate." (R. 24.)

Respondent then filed in the District Court a motion for leave to file an answer to the complaint (R. 27), seeking to raise in the said answer that proceedings against petitioners had been commenced prior to the effective date of the APA. (R. 30-32 as to petitioner Yanish, and 46-47 as to petitioner Diaz.)

On July 24, 1950, the decision of the Court of Appeals became final.

The District Court on July 27, 1950, noting that the decision of the United States Court of Appeals for the Ninth Circuit in the cause had become final, and that respondent had announced in open Court his intention not to file a petition for certiorari in that matter, denied the motion of respondent for leave to file an answer. (R. 58.) The Court on the same day filed a permanent injunction restraining respondent and his successors from initiating or conducting any proceedings seeking the deportation of petitioners or either of them without compliance with the requirements of the APA. (R. 56-57.)

On August 5, 1950, the Immigration Service published in the Federal Register an amendment to the regulations of March 10, 1950 (the regulations relied upon by the Court of Appeals in its mandate and opinion). The new regulations provided that hearings conducted in accordance with APA should be afforded only in cases where warrants had issued since the effective date of the Act. (15 Fed. Reg. 5042, August 5, 1950, *infra* App. A.)

Respondent then filed a notice of appeal, and later, on September 11, 1950, an amended notice of appeal (R. 58) to the Court of Appeals for the Ninth Circuit. The designation of points to be relied upon upon appeal specified error in denying respondent's motion for leave to file an answer; error in failing to dismiss the original complaint on the ground that the appellees had failed to exhaust their administrative remedies; error in failing to dismiss the complaint because of failure to join essential parties to the action; and error in granting the permanent injunction. (R. 63-64.)

On September 27, 1950, the Congress passed, as a rider to an appropriations act, the Supplemental Appropriations Act, Public Law 843, 81st Congress, 64 Stat. 1048, 8 U.S.C.A. §155a, *infra*, App. B.

On February 28, 1952, the Court of Appeals for the Ninth Circuit reversed the District Court for the second time and remanded the cause with instructions to vacate the permanent injunction and dismiss the cause. It held that:

> "In view of the fact that the Congress has made it mandatory that proceedings for the exclusion or expulsion of aliens, such as appellees, shall not be governed by the Administrative Procedure Act, nothing remains but to remand the cause to the District Court with instructions to vacate the permanent injunction and dismiss the cause."

It remarked in a footnote:

> "There is no constitutional infirmity in this change in procedure as it affects the appellees. Our former judgment was based upon a mere procedural requirement of the Administrative Procedure Act. This was a legislative, not a constitutional, requirement * * *"

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**SPECIFICATION OF ERRORS TO BE URGED.**

The Court of Appeals erred:

(1) In holding that, as applied and interpreted by the Immigration and Naturalization Service, there was no constitutional infirmity in the change in procedure from that required by the APA to that now afforded aliens by the Immigration Service in expulsion or deportation cases. (See App. C.)

(2) In holding that the decision of the District Court, granting a permanent injunction, in accordance with the mandate of the Court of Appeals, was not *res judicata* under all of the circumstances of this case.

(3) In reversing the District Court and remanding the cause with instructions to vacate the injunction and dismiss the cause.

**REASONS FOR GRANTING THE WRIT.**

I. The decision of the Court of Appeals holding that there is no constitutional infirmity in a change in procedure from that required by the APA to that now afforded aliens by the Immigration and Naturalization Service is necessarily a construction of the opinion of the Supreme Court of the United States in the case of *Wong Yang Sung v. McGrath,* 339 U.S. 33. The Supreme Court in that opinion clearly intimated that the proceedings used in deportation hearings by the Immigration and Naturalization Service prior to the date of that decision were of such doubtful constitutionality that a determination that the APA did not apply to such proceedings might raise serious doubts as to the constitutionality of the Immigration Act. The Supreme Court, after reviewing the practice followed by the Immigration Service, commented that to construe the Immigration Act as not governed by the APA

> "* * * might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

The procedure now used in deportation hearings is in all important respects identical with that reviewed by the Supreme Court in the *Wong Yang Sung* decision. (8 C.F.R. Part 151; see App. C *infra.*)

II. The decision of the Court of Appeals for the Ninth Circuit may be in conflict with a decision on the same question shortly to be announced by the Court of Appeals for the District of Columbia.

The principle question presented here is also presented in two cases now pending before the latter Court, to-wit, *McGrath v. Potash,* No. 11,185, and *McGrath v. Doyle,* No. 11,186. In those cases permanent injunctions were granted against the holding of hearings in deportation proceedings without compliance with the APA. The Immigration Service appealed. While those appeals were pending, the Supreme Court decided *Wong Yang Sung v. McGrath,* supra. The Immigration Service then abandoned its appeals. After the passage of the Supplemental Appropriations Act, the Immigration Service moved in the District Court for the District of Columbia for an order vacating the permanent injunctions. This motion was denied by the late Allan Goldsborough, District Judge. The Immigration Service's appeal from that denial is now pending before the Court of Appeals for the District of Columbia. Oral argument on that appeal is now set for May 12, 1952.

The filing of this petition prior to the decision in those causes pending before the Court of Appeals for the District of Columbia is made necessary by the requirements of time for the filing of this petition

and by the fact that an order of the Court of Appeals for the Ninth Circuit staying its mandate is conditioned upon the filing of this petition on a date prior to the date of oral argument in the *Potash* and *Doyle* cases.

III. The importance of the question presented is attested to by the fact that the decision of the Supreme Court in *Wong Yang Sung v. McGrath* raises serious doubts of the constitutionality of the Supplemental Appropriations Act as interpreted and applied by the Immigration Service and by the Court of Appeals for the Ninth Circuit. The unfair deportation procedure commented upon by the Supreme Court in the *Wong Yang Sung* decision has again been reinstated. If the Supplemental Appropriations Act is in fact constitutional as thus interpreted and applied, all aliens subject to deportation proceedings are assured of hearings which do not meet the standard of fairness which Congress has prescribed for the determination of matters much less vital than the issues involved in deportation proceedings.

The concern of Congress and of the people of the United States with the problems presented by aliens within the United States is so apparent from the legislation passed and under consideration in the Congress in recent years, and from the discussions in the public press, that the importance of deportation proceedings to the entire country cannot be denied.

The importance of the decision in this case to the thousands of aliens who may face deportation proceedings is matched by its importance in the admin-

istration of the immigration laws. If it is allowed to stand, it means that the requirement of fairness which the Supreme Court found *in the Constitution* can be avoided by the Congress. It means that aliens will hereafter be subjected to the prejudicial practices which the APA was designed to banish. It means that aliens are not entitled to rely upon the Constitution, but must look solely to the Congress for redress of wrongs they suffer at the hands of the Immigration Service. Since aliens cannot vote, this means they are essentially defenseless.

IV. The instant case raises a question left open in the decision of the Supreme Court in the case of *Harisiades v. Shaughnessy,* 96 L.Ed. 400, at 403. The Supreme Court there noted in footnote 4, that Harisiades in that case contended that, the APA aside, he was denied procedural due process in that in his hearings held in 1946 and 1947 the same individual acted both as presiding officer and examining officer. The Court dismissed consideration of that point in the following words:

> "However, it appears that the officer here performed both functions with Harisiades's consent. He, therefore, has no standing to raise the objection now."

In this cause objection was made to the procedure used, even before the first decision of any United States Court holding that the APA applied to deportation hearings. (R. 11.)

V. Under the circumstances the doctrine of *res judicata* should apply to the decision of the District

Court granting an injunction. The permanent injunction granted by the District Court in response to the mandate of the Court of Appeals was granted on the ground that the only type of hearing which the Immigration Service could afford to aliens in deportation cases was that set forth in the regulations of the department in effect at the time the case was decided by the Court of Appeals. Those regulations were also in effect at the time the injunction was granted on July 27, 1950. They remained in effect until August 5, 1950.[1] The decision of the Court of Appeals on the first appeal, directing the issuance of the injunction, became final on July 24, 1950, while the regulations were still in effect. There can therefore be no contention that there was error in granting the injunction.

The decision of the Court of Appeals having become final, all parties were concluded by it.

See:

*United States v. Munsingwear,* 340 U.S. 36;

*Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48;

*United States v. Pandit* (9th Cir.), 15 Fed. (2d) 285;

*Board of Councilmen v. Deposit Bank,* 124 Fed. 18.

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[1]The original modification of Immigration Service regulations, to bring them in compliance with the *Wong Yang Sung* decision, was published in the Federal Register on March 10, 1950 (15 Fed. Reg. 1299, et seq.). On August 5, 1950, these regulations were modified as set forth in Appendix A, infra. By stating that these new regulations would be effective as of March 10, 1950, the Immigration Service attempted to make its August modification retroactive to the preceding March.

It is said that in this case, a change in the law between the time when the earlier decision became final, and the second occasion for consideration of the question by the Court of Appeals, compelled change in the decision. Such a rationale can be accepted, however, only by doing violence to the plain meaning of the statute upon which the Court of Appeals relied. The statute, set forth *infra*, in Appendix B, says in words as plain as they can be made:

> "Proceedings under law relating to the exclusion or expulsion of aliens shall *hereafter* be without regard to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act * * *" (Our emphasis.)

Nothing in the language of that statute compelled a decision that the administrative proceedings already completed (R. 35, 39 with respect to petitioner Yanish; R. 52, 53 with respect to petitioner Diaz) upon which the respondent sought to go forward with the deportation of the petitioners, could be valid. The question before the Court was not whether future proceedings against petitioners were required to conform to the APA. The question was whether any error had been committed by the District Court in following the mandate of the Court of Appeals and granting an injunction. Nothing in the record raised any question about future proceedings under law relating to the expulsion of the petitioners. The position of the respondent was, that the hearings already completed, although not conducted in accordance with requirements of law in effect at the time of the hearings, may now be relied upon by the Immigration Service

because the law now says, "Proceedings * * * shall hereafter be without regard to the * * * Administrative Procedure Act * * *" The ready and correct answer to the issue before the Court is the application of the doctrine of *res judicata*.

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**CONCLUSION.**

For the foregoing reasons this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
May 9, 1952.

ALLAN BROTSKY,
*Counsel for Petitioners.*

GLADSTEIN, ANDERSEN & LEONARD,
LLOYD E. MCMURRAY,
ALLAN BROTSKY,
*Of Counsel.*

**(Appendices A, B and C Follow.)**

## Certificate of Counsel.

I hereby certify that I am of counsel for petitioners in the above entitled cause and that in my judgment the foregoing petition for Writ of Certiorari is well founded in point of law as well as in fact and that said petition for Writ of Certiorari is not interposed for delay.

Dated, San Francisco, California,
May 9, 1952.

Allan Brotsky,
*Of Counsel for Petitioners.*

## Appendix A

### MODIFICATION IN IMMIGRATION SERVICE REGULATIONS.

Printed below is the revision to Part 151 of Title 8, C.F.R., which was published in the Federal Register on August 5, 1950, 15 Fed. Reg. 5042:

PART 151—DEPORTATION PROCEEDINGS: HEARING AND ADJUDICATION. APPLICABILITY OF REGULATIONS.

July 19, 1950.

Effective as of March 10, 1950, Part 151, Deportation Proceedings: Hearing and Adjudication, of Chapter I, Title 8 of the Code of Federal Regulations, is amended by adding the following section:

§ 151.10. *Applicability of regulations.* The provisions of this part shall be applicable to all cases of aliens arrested in deportation proceedings except those cases in which warrants of arrest were served prior to September 11, 1946, regardless of whether or not hearings in such excepted cases were held during the period beginning September 11, 1946, and ending March 9, 1950, or reopened during that period for the purpose of lodging deportation charges additional to those contained in the warrant of arrest, but any hearings required in such cases on or subsequent to March 10, 1950, shall, for administrative convenience, be conducted pursuant to the provisions of this part.

(Sec. 23, 39 Stat. 892, sec. 24, 42 Stat. 166, sec. 37, 54 Stat. 675; 8 U.S.C. 102, 222, 458.)

A. R. MacKey,
Acting Commissioner of Immigration and Naturalization.

Approved: July 31, 1950.
J. Howard McGrath,
Attorney General.

[F. R. Doc. 50-6872; Filed. Aug. 4, 1950; 8:47 a.m.]

## Appendix B

**The Supplemental Appropriations Act, 1951 (Pub. L. 843, 81st Cong.) 64 Stat. 1048, 8 U.S.C.A. §155a, provides in pertinent part as follows:**

> **"Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007)."**

## Appendix C

Pertinent portions of current regulations for deportation hearings.

(NOTE: Only so much of the regulations is quoted as is necessary to show the prejudicial nature of the current regulations, as compared with the requirements of the APA. Italics in the body of the paragraphs are supplied.)

### CURRENT REGULATIONS PUBLISHED IN TITLE 8 C.F.R., PART 151.

§151.2 *Conduct of hearing*—(a) *Hearing officer; general powers.* The officer assigned to conduct the hearing under a warrant of arrest shall be referred to as the "hearing officer."

§151.2(b) *Hearing officer; general duties.* The hearing officer shall conduct a fair and impartial hearing. He shall use his independent judgment in rendering his decision and shall not perform any duties inconsistent with the duties and responsibilities of an adjudicating officer, *except as provided in this part.*

§151.2(c) *Hearing officer; specific duties.* At the commencement of the hearing under the warrant of arrest, the hearing officer shall (1) place the alien under oath or affirmation, (2) enter of record a copy of the warrant of arrest and explain to the alien in simple, understandable language the nature of the charges contained therein, and (3) advise the alien, if not represented by counsel or other qualified repre-

sentative, that he may be so represented if he desires and require him to state then and there for the record whether he desires such representation. Except as provided in paragraph (f) of this section, *the hearing officer shall thereafter present all available evidence,* including the interrogation of the alien and all witnesses presented, concerning (1) alienage, (2) date, place and manner of entry into the United States, (3) grounds for deportation, (4) factors bearing upon statutory eligibility for discretionary relief, and (5) such other information as may be pertinent to the issue of the case.

§151.2(e) *Withdrawal and substitution of hearing officer.* * * * The hearing officer assigned to conduct the hearing in any case may at any time withdraw if he deems himself disqualified.

§151.2(f) *Assignment of examining officer in addition to hearing officer; duties of examining officer.* An officer other than a hearing officer shall be assigned by the officer in charge of the district in which the hearing is held to act at the hearing as the "examining officer" in any case in which the warrant of arrest contains a charge, or an additional charge is lodged during the course of the hearing, that the alien is subject to deportation under (1) the act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, Public Law 831, 81st Congress; 8 U.S.C. 137); (2) the act of February 9, 1909, as amended (35 Stat. 614, 42 Stat. 596; 21 U.S.C. 171, 174-175); (3) the act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673; 8 U.S.C. 156a); or (4) so

much of section 19 of the Immigration Act of 1917 as amended (39 Stat. 889-890; 54 Stat. 671-673; 56 Stat. 1044; 8 U.S.C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and mental defectives; or in any other case, in the discretion of the officer in charge of the district. The examining officer shall in such cases conduct the interrogation of the alien and of the witnesses on behalf of the Government and the examination or cross-examination of the alien's witnesses, present all available evidence bearing upon the alien's liability to deportation, lodge such additional charges *as he may find to be applicable,* and, if the alien has applied for relief from deportation, inquire thoroughly into the alien's statutory eligibility for such relief. The hearing officer in such cases shall exercise all his *regular functions not herein assigned to the examining officer,* and he may, in addition, take such part in the interrogation of the alien and witnesses as he may deem necessary to assure that a full and proper hearing is held.

§151.3 *Contents of record; evidence*—(a) *Record.* The transcript of testimony and exhibits, together with all written motions and other papers and requests filed in the proceeding, shall constitute *the record* for the decision in the case.

§151.4 *Proposals and arguments upon conclusion of hearing.* [Revoked.]

§151.5 *Decision*—(a) *Preparation by hearing officer of written decision.* Except as provided in para-

graph (d) of this section, the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability.

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# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 61

NAT YANISH and JOHN DIAZ, *Petitioners*

v.

BRUCE G. BARBER, INDIVIDUALLY, and as DISTRICT DIRECTOR, 13TH IMMIGRATION DISTRICT, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Court of Appeals (R. 66-68) is not yet reported. A prior opinion of the Court of Appeals (R. 26-27) is reported at 181 F. 2d 492. The first opinion of the District Court (R. 20-23)

is reported at 81 F. Supp. 499; the order of the District Court after remand by the Court of Appeals (R. 58) is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered February 28, 1952 (R. 68-69). A petition for rehearing was denied April 4, 1952 (R. 69). The petition for a writ of certiorari was filed May 12, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## QUESTION PRESENTED

Whether the deportation hearings in this case, which did not conform in all respects with the Administrative Procedure Act, satisfied the requirements of procedural due process.

## STATUTE INVOLVED

The Supplemental Appropriations Act, 1951 (Pub. L. 843, 81st Cong.), 64 Stat. 1048, provides:

> Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007).

## STATEMENT

In October 1948, petitioners Yanish and Diaz, together with four other aliens no longer involved in this case, filed in the District Court for the

Northern District of California a "Complaint for Review of Agency Action and for Injunctive Relief" against the District Director of the Immigration and Naturalization Service for District Thirteen.[1] The complaint alleged that petitioners had each been served with a deportation warrant of arrest, and had objected to the conduct of the proposed deportation hearings on the ground that the Presiding Inspector assigned thereto had not been appointed pursuant to Section 11 of the Administrative Procedure Act, 5 U.S.C. 1010 (hereinafter called APA), and did not possess the qualifications and authority required under Sections 5, 7 and 8 of that Act, 5 U.S.C. 1004, 1006, 1007. There was no allegation in the complaint as to the date of service of any of the warrants of arrest. In addition to praying for interim relief, petitioners sought a permanent injunction restraining respondent from conducting deportation proceedings against them, except before a hearing officer appointed and acting in the manner required by the APA. (R. 3-10.)

The District Court granted respondent's motion to dismiss on the ground that the APA was inapplicable to deportation proceedings (R. 19-23). While petitioner's appeal to the Court of Appeals for the Ninth Circuit was pending, this Court held,

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[1] Respondent assumed the office of District Director after the case was instituted, and was substituted for the original defendant. For convenience, no distinction is made between acts of respondent and those of his predecessor.

in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, that the hearing provisions of the APA governed deportation proceedings. Effective March 10, 1950, the deportation regulations were amended to conform to that decision (15 F. Reg. 1297-1302). On April 24, 1950, the Court of Appeals filed a *per curiam* opinion reversing the judgment of the District Court "with instructions to grant the relief prayed for in the complaint, or if that course is found to be unnecessary to make such other disposition of the cause as may be appropriate" (R. 26-27). On May 25, 1950, the mandate was filed in conformity with the opinion (R. 23-25).

On the day the mandate was entered, respondent filed a motion for leave to answer with respect to Yanish (R. 28-30), and the motion was later amended to request leave to answer as to Diaz, also (R. 44-45). The principal object of the motion was to permit respondent to set forth, by answer, the defense that, under Section 12 of the APA, 5 U.S.C. 1011, compliance with the hearing requirements of the Act was not mandatory, since the deportation warrant of arrest in each instance had been served prior to September 11, 1946, the earliest date any provision of the Act became effective. In support of the motion, as to Yanish, the Assistant District Adjudications Officer for the Service submitted an affidavit (R. 30-40) stating that the deportation warrant of arrest charging him with being in the United States in violation of the Act of

October 16, 1918, as amended, 8 U.S.C. 137, had been issued and served on April 11 and May 21, 1946, respectively; that affiant presided at the administrative hearings which began February 26, 1948; that at the seven hearings held in regard to Yanish various persons other than affiant presented the Government's case as examining inspectors; that on February 14, 1950, affiant prepared an opinion in the case, including a proposed order directing Yanish's deportation to Russia, but that the opinion and record in the hearing had not been submitted to the Commissioner of Immigration and Naturalization because of the instant action. Another affidavit by an immigration inspector (R. 46-53) recited that as to Diaz the deportation warrant of arrest, also charging him with being in the United States in violation of the 1918 act, had been issued and served on July 24 and October 25, 1934, respectively; that following hearings in 1934 and 1935, a warrant of deportation, directing his deportation to Spain, had been issued in 1936; that on September 3, 1947, the Board of Immigration Appeals had ordered the warrant of deportation withdrawn and the case remanded to the service for further hearings; that the hearings had been reopened on June 29, 1949; that at the six hearings held in regard to Diaz affiant had presented the Government's case as examining inspector; that on February 28, 1950, the presiding inspector had prepared an opinion recommending that the depor-

tation warrant of arrest be cancelled and that the proceedings be closed; and that no decision on this matter had yet been received from the commissioner.

On July 27, 1950, six months after hearings as to both men had been completed, the District Court denied respondent's motion for leave to answer (R. 58) and filed a permanent injunction restraining respondent from initiating or conducting proceedings seeking the deportation of petitioners without compliance with the act.

On September 11, 1950, respondent filed a notice of appeal from this judgment.

Between the date of the issuance of the injunction and the second decision by the Court of Appeals, several changes were made in the controlling law and regulations. On July 31, 1950, the deportation regulations, as amended in compliance with the *Sung* decision, were further amended by the addition of a section which made the new regulations inapplicable to hearings held prior to March 10, 1950, under warrants of arrest served prior to September 11, 1946. 15 F. Reg. 5042, 8 C.F.R. (1951 Cum. Supp.) 151.10. On September 27, 1950, the Supplemental Appropriation Act, Pub. L. 843, 81st Cong., was enacted, containing a provision exempting deportation hearings from the hearing provisions of the APA. Effective November 10, 1950, the deportation regulations were revised to conform to the statutory provision, 15 F. Reg. 7636, 8 C.F.R. (1951 Cum. Supp.) § 151. The

revised regulations repealed Section 151.10, *supra*, but provided that the regulations adopted after the *Sung* decision were to apply only to proceedings instituted after September 11, 1946, the effective date of the Administrative Procedure Act, and concluded prior to September 27, 1950, the date of the statutory change exempting deportation proceedings from the coverage of that Act.

On February 28, 1952, the Court of Appeals rendered its judgment remanding the cause to the District Court with instructions to vacate the permanent injunction and dismiss the cause. The court based its decision exclusively on the statutory change produced by the Supplemental Appropriation Act, *supra*.

## ARGUMENT

This petition seeks review of the judgment of the Court of Appeals for the Ninth Circuit ordering the District Court for the Northern District of California to vacate an injunction restraining respondent from conducting deportation proceedings against petitioners that do not conform fully with the provisions of the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.* The administrative hearings are now completed, and, in fact, were finished six months before the permanent injunction was issued, so that it is evident that petitioners are really seeking a determination of the validity of the already completed hearings. Since the recommendations of the Presiding Inspectors have not yet

been acted upon by the Commissioner of Immigration and Naturalization (R. 39, 53), it would seem clear that the doctrine of "exhaustion of administrative remedies" bars consideration of the question at this time. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Riss & Company* v. *Interstate Commerce Commission*, 179 F. 2d 810 (C.A. D.C.). The application of that doctrine is peculiarly appropriate here since the presiding inspector has recommended cancellation of the Diaz warrant of arrest (R. 52).

Petitioners contend, however, that the original decision and mandate of the Court of Appeals, pursuant to which the District Court granted a permanent injunction, was an adjudication of the invalidity of the hearings and that the subsequent enactment of the Supplemental Appropriations Act could not confer validity upon them. However, the only issue then before the court was whether deportation proceedings in general were subject to the APA; no question had yet been raised as to the applicability of the act to petitioners, against whom proceedings had been instituted prior to the effective date of the act.[3] The mandate, which ordered

[3] The first Court of Appeals opinion interpreted the regulations issued after the *Sung* decision as applying irrespective of the time when the proceedings were instituted, but this observation was extraneous to the issue then under consideration, and can not stand as an adjudication. Moreover, as stated in the text, *infra*, p. 9, this Court in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, expressly held that APA does not apply to proceedings instituted before its effective date.

the District Court to grant the relief prayed for in the complaint "or if that course is found to be unnecessary to make such other disposition of the cause as may be appropriate," left that question open for later determination. However, relying on the Supplemental Appropriations Act, the Court of Appeals ordered vacation of the injunction without making any ruling as to the initial applicability of the APA to petitioners. That it was not applicable is made clear by the decision of this Court in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 583, holding that proceedings instituted before the effective date of the Act, such as those in this case, need not conform to its requirements.

Therefore, having no statutory right to a hearing as prescribed by the APA, petitioners' chief argument is that the procedure followed in these hearings, and now in effect authorized in deportation proceedings by the Supplemental Appropriations Act, departs from constitutional standards of fairness. They rely on language in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, which suggests that hearings not conforming to the Administrative Procedure Act might not measure up to constitutional standards of fairness. 339 U. S. at 50. Elsewhere in the opinion, however, it was observed that if inclusion of the immigration agencies within the coverage of the Act was erroneous, "relief from Congress is a simple matter" p. 47, an explicit recognition that suitably fair procedures could be had without compliance with the Act. The

fact that Congress promptly acted to exempt deportation proceedings from the provisions of the Act is evidence of Congress' belief that the Administrative Procedure Act provided safeguards considerably beyond the constitutional minima; and that belief was well-founded as is demonstrated by the long history of judicial approval of deportation proceedings prior to the Act. Standards of fairness are set out in *Tisi* v. *Tod,* 264 U. S. 131, where this Court held that unless there is error "so flagrant as to convince a court that the hearing had was not a fair one," the requirements of due process are met if the alien is given due notice of the charge and ample opportunity to prepare and present his case, with the aid of counsel if he so desires.

Prior to the Act, the commingling of investigative and fact finding functions banned by Section 5, 5 U.S.C. 1004(c), although unfavorably commented upon by some courts, was consistently held not to vitiate hearings otherwise fair. *Palmer* v. *Ultimo,* 69 F. 2d 1, 2 (C.A. 7); *Reynolds* v. *United States,* 68 F. 2d 346, 348 (C.A. 7); *In re Giacobbi,* 32 F. Supp. 508, 515 (N.D. N.Y.). In the *Sung* case, the practice of combining investigating, prosecuting, and adjudicating functions was pointed to as an abuse which the Act was particularly "intended to ameliorate" (p. 46), and subsequently, in *Harisiades* v. *Shaughnessy, supra,* objection again was made that, irrespective of the APA, procedural due process was violated when

"the same individual acted both as presiding officer and examining officer." *Ibid.*, p. 583-584. While this Court seems to have left that question open by rejecting Harisiades' contention on the basis of his having consented to the performance of both functions by one officer, the question is not present in the instant case, as petitioners contend (Pet. 11). Here, unlike both *Sung* and *Harisiades*, examining inspectors, who had been appointed to act in such capacity, presented the Government's case at hearings conducted by different officials, designated presiding inspectors, who performed the fact-finding function.[3] The fact that the presiding inspectors were not hearing examiners qualified under the Civil Service laws, pursuant to Section 11 of the Act, plainly is insufficient to establish a lack of due process in the absence of any showing of unfair or arbitrary conduct of the hearings or of rulings lacking any evidentiary support. There is nothing inherently unfair in using qualified examiners whose appointment was not under Civil Service, so long as their actions do not manifest bias or arbitrariness. Cf. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103; *Tisi* v. *Tod, supra.*

[3] Such separation of functions is now made mandatory in several classes of deportation cases. 8 C.F.R. (1951 Cum. Supp.) 151.2(f).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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